

Louisiana Law Review

Volume 16 | Number 1
December 1955

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Repository Citation

Charles M. Lanier, *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana - Certification*, 16 La. L. Rev. (1955)
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The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana—Certification

According to accepted banking practice, one desiring to lend added security to a transaction involving payment by check may have the check certified by the bank on which it is drawn and thus insure its ready acceptability. Certification is an act whereby a drawee bank obligates itself to pay a check according to its terms.¹ This is usually accomplished by the bank's stamping across the face of an instrument drawn on itself the word "certified" or "accepted" followed by the name of the bank and signed by an authorized bank officer or employee.² From this process a number of legal problems have arisen. It is the purpose of this Comment to discuss first, the development of the law of certification in Louisiana; second, its treatment under the NIL;³ and third, the possible effects which the adoption of the proposed Uniform Commercial Code⁴ would have on the matter.

Certification in Louisiana

The development of the law of certification in Louisiana did not parallel exactly that of the common law states. It was many years after the practice of certification was established in common law jurisdictions that the first case on the subject arose in Louisiana.⁵ The language of that case, however, indicates that certification was by no means a new practice in this state. Thereafter, in cases involving certification, Louisiana courts did not hesitate to consult and apply the law of other jurisdictions,

1. 1 PATON, DIGEST 797 (1940).

2. *Ibid.* For a discussion concerning authority to certify, see *id.* at 799 *et seq.*, 817 *et seq.*, and Annot., 1 A.L.R. 693, 710 (1919). Generally, any wording leading to reliance on the statement of the officer will be sufficient to constitute certification. 1 PATON, DIGEST 826 *et seq.* (1940). The wording "through the New Orleans Clearing House, indorsement guaranteed," however, does not constitute certification. See *M. Feitel House Wrecking Co. v. Citizens' Bank & Trust Co.*, 2 La. App. 118 (1925), *affirmed*, 159 La. 752, 106 So. 292 (1925), apparently overruling *Mutual National Bank v. Rotge*, 28 La. Ann. 933 (1876), which had held that similar words constituted certification.

3. LA. R.S. 7:187-188 and related sections (1950).

4. UNIFORM COMMERCIAL CODE, OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (1952). Changes in the Official Draft which have been adopted since 1952 are indicated where applicable.

5. *Louisiana State Bank v. Hibernia Bank and Germania National Bank*, 26 La. Ann. 399 (1874).

unless specific Civil Code provisions required a different result.⁶ This was especially evident in cases involving forgery or alteration of checks. Early Louisiana cases recognized that the drawee is bound to know the drawer's signature and cannot charge his account if his signature was forged or unauthorized, in the absence of the drawer's negligence.⁷ The Civil Code, however, expressly recognized the right to recover the money paid through mistake or error.⁸ But this rule was qualified to the extent that recovery would be denied if there were reliance on the acceptance or certification leading to the purchase of the instrument or if, once paid, the drawee delayed in seeking recovery and the one who received payment changed his position in reliance on the delay.⁹ Thus, despite common law decisions to the contrary, Louisiana courts permitted the drawee bank to recover money paid on a check on which the drawer's signature was forged where it was not shown that the check was purchased in reliance on the acceptance.¹⁰ But where reliance could be shown, the courts were quick to deny recovery.¹¹ Again, contrary to the ma-

6. Unfortunately, they did so frequently with little knowledge of their meaning. See *Louisiana National Bank v. Citizens' Bank*, 28 La. Ann. 189, 26 Am. Rep. 92, 94 (1876), where the court cited *Price v. Neal*, 3 Burr. 1354, 1357, 97 Eng. Rep. 871 (K.B. 1762), for the proposition that "one of two innocent persons must suffer in this case; it would seem but just that he whose act has caused the loss should bear it." The court went on to refuse a drawee the right to recover money paid on a fraudulently raised check, a situation to which the doctrine of *Price v. Neal* has never been extended. See *Bank of Commerce v. Union Bank*, 3 Const. 230 (N.Y. 1850), and cases cited in BRITTON, BILLS AND NOTES § 140, no. 1 (1943).

7. *Etting v. The Commercial Bank*, 7 Rob. 459 (La. 1844); *Laborde v. The Consolidated Association of the Planters of Louisiana*, 4 Rob. 190, 39 Am. Dec. 517 (La. 1843).

8. LA. CIVIL CODE art. 2301 *et seq.* (1870); LA. CODE OF PRACTICE art. 18 (1870). This same principle was recognized in the Civil Code of 1825. See LA. CIVIL CODE art. 2279 *et seq.* (1825). See also *Butler v. J. B. Murison & Co.*, 18 La. Ann. 363 (1866); *Citizens' Bank v. Dugue and Louisiana State Bank*, 5 La. Ann. 12 (1850); *Oakey v. Bank of Louisiana*, 17 La. 386 (1841), all decided at the same time that the principle was being formulated that there must be actual reliance to deny recovery. For a discussion of this subject, see Notes, 15 TUL. L. REV. 468 (1941), 23 TUL. L. REV. 174 (1948).

9. *McKleroy & Bradford v. Southern Bank of Kentucky*, 14 La. Ann. 458, 74 Am. Dec. 438 (1859); *McCall v. Corning*, 3 La. Ann. 409 (1848). Although these two cases did not involve certification, they established the principle that there must be reliance on the acceptance or a change in the position of the payee for recovery to be denied. See *Howard & Preston v. The Mississippi Valley Bank*, 28 La. Ann. 727 (1876), applying this principle to deny recovery. This principle was applied in cases involving certification. See also *Louisiana National Bank v. Citizens' Bank*, 28 La. Ann. 189, 26 Am. Rep. 82 (1876); *Louisiana State Bank v. Hibernia Bank and Germania National Bank*, 26 La. Ann. 399 (1874).

10. *Louisiana National Bank v. Citizens' Bank*, 28 La. Ann. 189, 26 Am. Rep. 92 (1876); *Louisiana State Bank v. Hibernia Bank and Germania National Bank*, 26 La. Ann. 399 (1874); *McKleroy v. Southern Bank of Kentucky*, 14 La. Ann. 458, 74 Am. Dec. 438 (1859); *McCall v. Corning*, 3 La. Ann. 409 (1848).

11. *Howard & Preston v. The Mississippi Valley Bank*, 28 La. Ann. 727

jority common law rule, the Louisiana courts refused to permit the drawee bank to recover money paid on a check that had been raised prior to certification or acceptance where it was established that the check had been negotiated in reliance on the bank's approval of the check.¹²

The adoption of the NIL in Louisiana in 1904¹³ ended these differences and brought Louisiana into accord with the majority of the common law jurisdictions. In speaking of the effect to be given to the NIL when in conflict with prior law, a Louisiana court in one case said: "[W]e are dealing with one of the several uniform laws adopted by our State and it is desirable that the construction given such laws be uniform."¹⁴ The court held that payment of a check on which the signature of the payee had been forged did not constitute an acceptance, thereby refuting the principles on which the earlier cases had been decided.¹⁵ In 1940, the court recognized the doctrine of *Price v. Neal* by rejecting prior jurisprudence that allowed recovery by a drawee from a

(1876). It has been stated that this case constituted a recognition of the doctrine of *Price v. Neal* in Louisiana. See BRITTON, BILLS AND NOTES § 133, no. 5 (1943). It is submitted, however, that although the cases reached the same conclusion, they did so on different grounds. For a discussion of the doctrine see Ames, *The Doctrine of Price v. Neal*, 4 HARV. L. REV. 297 (1890); Comment, *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana — The Doctrine of Price v. Neal*, 16 LOUISIANA LAW REVIEW 123 (1955).

12. *Louisiana National Bank v. Citizens' Bank*, 28 La. Ann. 189, 26 Am. Rep. 92 (1876). For cases not involving certification, see *Commercial Press, Smith & Goldsmith v. Crescent City National Bank*, 26 La. Ann. 744 (1874); *F. J. Vanbibber & Co. v. The Bank of Louisiana*, 14 La. Ann. 481 (1859).

13. La. Acts 1904, No. 64, p. 147, now LA. R.S. 7:1 *et seq.* (1950).

14. *M. Feitel House Wrecking Co. v. Citizens' Bank & Trust Co.*, 2 La. App. 118, 120-21 (1925), *affirmed*, 159 La. 752, 106 So. 292 (1925).

15. The *Feitel* case has been consistently followed. *Joffrion-Woods, Inc. v. Hibernia Bank & Trust Co.*, 19 La. App. 419, 139 So. 22 (1932); *Spremich v. Somerfield*, 166 So. 630 (La. App. 1936); *Lawrence J. Kern, Inc. v. Panos*, 177 So. 432 (La. App. 1937); *Strudwick Funeral Home, Inc. v. Liberty Industrial Life Ins. Co.*, 176 So. 679 (La. App. 1937); *Blanchard v. Bank of Morgan City & Trust Co.*, 185 So. 120 (La. App. 1938). The *Feitel* case is important in another respect. Prior to the adoption of the NIL the Louisiana court had found privity of contract between the holder of a check and the drawee bank, despite common law decisions denying such right on the basis that a chose in action is not assignable. See *Gordon & Gomila v. Muchler*, 34 La. Ann. 604 (1882), *overruling* *Case v. Henderson*, 23 La. Ann. 49, 8 Am. Rep. 590 (1871), which had accepted the common law rule. See also *State ex rel. St. Amand v. Bank of Commerce*, 49 La. Ann. 1060, 22 So. 207 (1897); *F. J. Vanbibber & Co. v. The Bank of Louisiana*, 14 La. Ann. 481 (1859); *McKleroy & Bradford v. Southern Bank of Kentucky*, 14 La. Ann. 458 (1859), requiring notice to the bank that the check was drawn before permitting suit. These rulings are in accord with civilian principles. See LA. CIVIL CODE art. 2642 *et seq.* (1870). The *Feitel* case, however, held that adoption of NIL § 189 overruled this line of cases and established the common law rule, thus requiring acceptance or certification in Louisiana. *But see* BRANNAN, NEGOTIABLE INSTRUMENTS LAW 1324, § 189 (7th ed., Beutel, 1948), where the *Feitel* case is criticized as wrong.

holder in due course on a check that the former had certified and which contained a forgery of the drawer's signature.¹⁶

The Louisiana courts have not been called upon to rule on questions of certification very frequently; and, as a result, many points remain to be determined. Since the courts have indicated that they will apply the uniform law, the decisions reached in other states are of great importance. A change in those rules should be of considerable significance in Louisiana. The following section will present the most important of the present rules of certification with an indication of the areas of conflict. The remainder of the discussion will be devoted to a determination of the possible effect an adoption of the proposed Uniform Commercial Code would have on those rules.

Certification Under the NIL — In General

There are only two provisions of the NIL which deal specifically with the subject of certification.¹⁷ Those provisions are as follows:

NIL section 187: "Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance."

NIL section 188: "Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon."

The two cited provisions of the NIL incorporate only the basic rudiments of the law of certification and do not express all of the law on the subject. Principles established prior to the adoption of the NIL remain effective unless in conflict with the statutory law.¹⁸ The remainder of the law of certification has been

16. *Security Bank & Trust Co. v. First National Bank*, 199 So. 472 (La. App. 1940), 15 TUL. L. REV. 468 (1941). As a general rule, it may be said that the rule that money paid in error can be recovered now obtains in Louisiana, with the exception of the doctrine of *Price v. Neal*. See Comment, *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana — The Doctrine of Price v. Neal*, 16 LOUISIANA LAW REVIEW 128 (1955); *Turner v. Tri-State Airmotive Co.*, 33 So.2d 707 (La. App. 1948), 23 TUL. L. REV. 174 (1948), permitting the person whose account has been charged with a forged check to elect whether to sue the payee or the bank.

17. For an excellent discussion of the development of the certified check, see Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450 (1935). For background discussion and an analysis of early leading cases, see Tompkins, *The Certification of Checks*, 50 AM. L. REG. (O.S.) 127 (1902).

18. LA. R.S. 7:195 (1950): "In any case not provided for in this Chapter the rules of the law merchant shall govern." See corresponding NIL § 196.

developed through judicial interpretation of related provisions of the NIL. This approach has resulted in many varied interpretations of those provisions and the uniformity intended to be obtained by the adoption of the NIL has not been attained.¹⁹

As a general rule, banks will not certify bearer checks, undated checks, checks endorsed without recourse, previously dishonored checks, and checks which the drawer has instructed should not be certified.²⁰ Federal and state law prohibit bank officials from certifying checks against insufficient funds.²¹ To be effective, certification must be in writing, but this writing may be on a separate instrument.²² Thus, certification can be accomplished through a telegraphed instrument.²³ Where a check is certified by the bank on which it is drawn, this certification is equivalent to an acceptance.²⁴ By this procedure the bank becomes primarily liable to the holder of the instrument.²⁵

19. For a discussion of difficulties encountered in early interpretations of the NIL, see Ames, *The Negotiable Instruments Law*, 14 HARV. L. REV. 241 (1900); Ames, *The Negotiable Instruments Law—A Word More*, 14 HARV. L. REV. 442 (1901); Ames, *The Negotiable Instruments Law—Necessary Amendments*, 16 HARV. L. REV. 255 (1902); Brewster, *The Negotiable Instruments Law—A Rejoinder to Dean Ames*, 15 HARV. L. REV. 26 (1901). The cited articles relate to what has become known as "the Ames-Brewster controversy," which has been discussed by McKeehan, *The Negotiable Instruments Law (A Review of the Ames-Brewster Controversy)*, 50 AM. L. REG.(O.S.) 437, 499, 561 (1902). See also Turner, *Revision of the Negotiable Instruments Law*, 38 YALE L.J. 25 (1928); Turner, *A Factual Analysis of Certain Proposed Amendments to the Negotiable Instruments Law*, 38 YALE L.J. 1047 (1929).

20. 1 PATON, DIGEST 814 *et seq.* (1940). The primary reason given is that it is against good banking practice, although it would also cause loss of good will in certain instances. See Dahlin, *What Every Lawyer Should Know About . . . Checks*, 43 ILL. B.J. 168, 172 (1954). Dahlin gives us another reason for banks refusing to certify checks payable to "cash" or "bearer" a federal administrative announcement to the effect that such certification created fiat money in violation of the law, which announcement, although not binding, may still be remembered.

21. See 62 STAT. 749, 18 U.S.C. § 1004 (1948). For the Louisiana statute, see LA. R.S. 6:15 (1950): "No officer or employee of any state bank, savings bank, or trust company shall certify any checks, drafts, or order drawn on the bank or trust company unless the person drawing the check, draft, or order has on deposit with the bank or trust company at the time of certification an amount of money equal to at least the amount specified in the check, draft, or order."

22. NIL §§ 132-135.

23. *Ibid.* See *Commercial Bank v. First National Bank*, 147 La. 925, 86 So. 342 (1920), cited in Annot., 13 A.L.R. 986, 989 (1921). See also Annots., 26 A.L.R. 312 (1923), 2 A.L.R. 1146 (1919); BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 187 (7th ed., Beutel, 1948); BRITTON, BILLS AND NOTES § 180 (1943); 1 PATON, DIGEST 826, 828 (1940).

24. NIL § 187.

25. NIL §§ 62, 192. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 187 (7th ed., Beutel, 1948), citing *Downey v. Citizens State Bank*, 100 Ind. App. 158, 194 N.E. 743 (1945); BRITTON, BILLS AND NOTES § 180 (1943); 1 PATON, DIGEST 797 (1940); STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER 139-40 (2d ed. 1954). A cashier's check, on the contrary, is received in payment and not as an added obligation. See *Nelson v. Christian Reformed Church*, 290 Ill. App. 260, 8 N.E.2d 385 (1937); *Berg v. Federal Reserve Bank*, 55 N.D. 406, 213 N.W. 963 (1927).

There is, however, no assignment of funds; nor is any special preference to the funds created by the certification in favor of the holder.²⁶ The amount of the check, however, is deducted from the drawer's account and is then transferred to the "certified check" account on the general books of the bank.²⁷ Although the funds assigned to meet payment of the certified checks generally are not considered to be deposit liability, a certified check is within the protection afforded by the Federal Deposit Insurance Corporation.²⁸ It is a general rule that the drawer of a check merely contracts that it will be paid on presentment, not that it will be certified. The drawee bank is under no obligation to certify a check and a refusal to do so does not dishonor the instrument.²⁹ Certification obtained by a stranger or by one unauthorized to do so has no effect as regards the parties to the instrument.³⁰

26. NIL § 189. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 187 (7th ed., Beutel, 1948); see also Lloyd v. The Butler County State Bank, 122 Kan. 835, 253 Pac. 906 (1927); Annot., 51 A.L.R. 1030, 1034 (1927); STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER 139-40 (2d ed. 1954). But note that for bankruptcy and insolvency statutes, the certification date has been held to be the date of transfer. See Annot., 7 A.L.R.2d 1015, 1020 (1949).

27. 1 PATON, DIGEST 797 (1940). The point has been raised that the bank has no voucher in its possession upon certification to justify its charge to the drawer's account. The use of photostats has been recommended as a partial solution to this problem in case of loss or alteration. See Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. Rev. 450, 459, n. 56 (1935).

28. 12 C.F.R. § 330.1 (1949). See Breckenridge, *The Banking Act of 1935*, 22 A.B.A.J. 93, 95 (1936), as cited in STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER 140 (2d ed. 1954). This was not true under early state guaranty statutes. See Butts, *State Regulation of Banking by Guaranty of Deposits*, 2 Miss. L.J. 208 (1930).

29. Wachtel v. Rosen, 249 N.Y. 386, 164 N.E. 326 (1928); Annot., 62 A.L.R. 374 (1929); BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 187 (7th ed., Beutel, 1948); BRITTON, BILLS AND NOTES § 180 (1943); 1 PATON, DIGEST 814 *et seq.* (1940).

30. 1 PATON, DIGEST 819 *et seq.* (1940); see Empire Trust Co. v. Cahan, 274 U.S. 473, 57 A.L.R. 921, 925 (1927); State Bank v. Mid-City Trust & Savings Bank, 295 Ill. 599, 129 N.E. 498, 12 A.L.R. 989, 992 (1920); Whiting v. Hudson Trust Co., 234 N.Y. 394, 138 N.E. 33, 25 A.L.R. 1470, 1480 (1923); Comment, *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana—The Impostor Rule*, 16 LOUISIANA LAW REVIEW 115 (1955). For the proposition that a collecting bank has no authority to accept anything but cash, see Wessell Plumbing Co. v. Scriber & Curtis, 134 So. 336 (La. App. 1931); Lake Charles Feed Co. v. Sabatier, 14 La. App. 233, 125 So. 318 (1929), *affirmed on rehearing*, 14 La. App. 233, 235, 129 So. 261 (1930). This was seriously questioned, however, in Bain v. Worsham, 159 So. 463, 465 (La. App. 1935), where the court found the drawee bank to be the agent of the payee in collecting from the drawer and denied the payee the right to recover from the drawer where the drawee failed to remit the funds after charging the drawer's account. For the proposition that the crediting of the depositor's account is payment of a check drawn on the bank of deposit, see Sowers Co. v. First Nat. Bank, 6 La. App. 721 (1927); Schutte v. Citizens Bank, 3 La. App. 547 (1926). One accepting a certified check runs risk of nonpayment. See Annot., 61 A.L.R. 739, 748 (1929). In Louisiana, tender of a check is not payment. See Sadler v. May Bros., Inc., 185 So. 81 (La. App. 1938); Shushan

Certification differs from acceptance in at least two respects. In the acceptance of a bill of exchange other than a check the drawer's account is not charged.³¹ Further, and more important, in the acceptance of a demand bill of exchange other than a check, the drawer and the endorser are not discharged, but remain secondarily liable on the instrument.³² This latter rule also applies to an acceptance or certification of a check at the request of the drawer.³³ But where acceptance or certification of a check is procured at the request of the holder, the drawer and all endorsers are discharged.³⁴ In such an instance, certification has been deemed the equivalent of payment.³⁵ Other courts have held that certification is a new contract substituted for that of the drawer.³⁶ This confusion has led a few courts to conclude that certification is not an acceptance but a thing *sui generis*.³⁷

Bros. & Co. v. Hinson, 154 So. 648 (La. App. 1934); W. K. Neckwear Co. v. Rabinowitz, 133 So. 450 (La. App. 1931). As regards tender of a certified check, where the holder procures certification the drawer is discharged. Where the drawer procures certification it has been held that the payee must object to payment being made in this form for it not to constitute final payment. See Annots., 87 A.L.R. 442, 444 (1933), 52 A.L.R. 994, 1001 (1928); Karvalsky v. Becker, 217 Ind. 524, 29 N.E.2d 560 (1940), for the proposition that mere receipt of the check without agreement that it shall be treated as payment does not constitute payment. The fact that a check is certified will not take it out of the operation of the doctrine that a tender by check is not ordinarily payment. See Annots., 131 A.L.R. 1074 (1941); 23 A.L.R. 1284, 1286 (1923); Thompson v. Crains, 294 Ill. 270, 128 N.E. 508 (1920), for proposition that objection to a tender that it was not sufficient waives objections that it was by certified check instead of cash; Annots., 51 A.L.R. 393, 395 (1927); 12 A.L.R. 931 (1921). For Louisiana cases holding an accord and satisfaction to have taken place upon certification, see Fuss v. Cordeleria de San Juan, S.A., 224 La. 338, 69 So.2d 365 (1953); Berger v. Quintero, 170 La. 37, 127 So. 356 (1930). *But cf.* Conner v. Harper, 197 La. 677, 2 So.2d 177 (1941), cited in *The Work of the Louisiana Supreme Court for the 1940-1941 Term—Bills and Notes*, 4 LOUISIANA LAW REVIEW 202-03 (1942); Selber Bros., Inc. v. Newstadt's Shoe Stores, 203 La. 316, 14 So.2d 10 (1943).

31. Dahlin, *What Every Lawyer Should Know About . . . Checks*, 43 ILL. B.J. 168, 171-72 (1954).

32. NIL § 61.

33. Brown v. Leckie, 43 Ill. 497 (1867); Bickford v. First National Bank, 42 Ill. 238 (1866); Rounds v. Smith, 42 Ill. 245 (1866) are the cases which established this principle. See discussion in Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 467 *et seq.* (1935).

34. First National Bank v. Leach, 52 N.Y. 350 (1873) is recognized as the primary case for this principle. See Jones, *The Liability of the Maker of a Check After Certification*, 6 HARV. L. REV. 138 (1892); Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 468 *et seq.* (1935); Tompkins, *The Certification of Checks*, 50 AM. L. REG. (O.S.) 127 (1902).

35. Smith v. Miller, 43 N.Y. 171, 176 (1870); Essex County Nat. Bank v. Bank of Montreal, 7 Biss. 193 (C.C. 1876), as cited in Steffen & Starr, *A Blue Print for Certified Checks*, 13 N.C.L. REV. 450, 469, n. 103 (1935).

36. Boyd v. Nasmith, 17 Ont. 40, 41 (1889), as cited in Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 469, n. 104 (1935).

37. Minot v. Russ, 156 Mass. 458, 31 N.E. 489 (1892) is the initial authority for this proposition.

There is dispute concerning the length of time the drawer remains secondarily liable where he procures the certification.³⁸ Some cases seem to indicate that he continues to be liable indefinitely as a guarantor of the bank's liability.³⁹ Under the NIL, however, a check must be presented for payment within a reasonable time;⁴⁰ but the drawer remains liable except to the extent that he has suffered loss by the delay.⁴¹ There is also a question whether the holder is entitled to bring the drawer's action for the amount of the loss.⁴² In addition, there is conflict concerning the time when the statute of limitations begins to run. Some courts hold that it begins to run at the time of certification.⁴³ The majority rule, however, is that the statute of limitations does not begin to run until the check is presented for payment.⁴⁴ The theory underlying this conclusion is that a certified check is not due until presented for payment.⁴⁵

Under an extension of the doctrine of *Price v. Neal*⁴⁶ the drawee bank is liable to the holder if it certifies a check on which the signature of the drawer has been forged. It will not be permitted to charge the drawer's account, nor may it recover from a holder in due course any sum paid. But the drawee bank is not liable to the forger, the thief, or one not a holder in due course.⁴⁷

38. See discussion in Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 470 *et seq.* (1935), and authorities cited therein.

39. *Ibid.*, referring to criticism of the case of *Born v. Bank of Indianapolis*, 123 Ind. 78, 28 N.E. 689 (1889).

40. NIL § 186. According to *Seager v. Dauphinee*, 284 Mass. 96, 187 N.E. 94 (1933), this means promptly or the drawer is completely discharged.

41. NIL § 186. See Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 471, n. 113 (1935), to the effect that there are two delay periods, one under NIL § 186 and the other under NIL § 71.

42. Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 471 (1935); STEFFEN, *CASES ON COMMERCIAL AND INVESTMENT PAPER* 149 (2d ed. 1954).

43. 1 PATON, *DIGEST* 843 (1940).

44. *Ibid.* A certified check is compared to a certificate of deposit concerning which the same dispute exists. See *Dean v. Iowa-Des Moines National Bank & Trust Co.*, 227 Iowa 1239, 290 N.W. 664 (1940); Annot., 128 A.L.R. 137, 157 (1940); *Keleher v. Manufacturers' Trust Co.*, 145 Misc. 589, 260 N.Y. Supp. 899 (N.Y. Mun. Ct. 1932). For liability of the bank, see Annot., 42 A.L.R. 1138 (1926), where it is stated that the cases uniformly hold that mere delay in presenting a certified or accepted check to a drawee bank for payment does not, unless by operation of the statute of limitations, release the bank from liability thereon.

45. See *Dean v. Iowa-Des Moines National Bank & Trust Co.*, 227 Iowa 1239, 290 N.W. 664, 128 A.L.R. 137, 157 (1940).

46. See note 11 *supra*.

47. 1 PATON, *DIGEST* 804 *et seq.* (1940). See especially *Fidelity & Casualty Co. v. Planenscheck*, 200 Wis. 304, 227 N.W. 387 (1929), where it was said: "The rule established by the NIL that a bank honoring a forged check cannot recover back the amount paid out, deals with the rights and liabilities of those who are legitimate parties to the instrument and does not prohibit the bank from re-

In the absence of negligence the certifying bank may refuse payment of checks which are altered after certification and may recover any amount paid on the altered instrument.⁴⁸ But there is some conflict concerning the liability of the drawee bank that certifies a check on which the name of the payee has been changed or the amount of the check has been raised.⁴⁹ Generally, the rule obtains that money paid in error may be recovered.⁵⁰ The Illinois and California courts, however, have held the drawee bank liable when it certified a check on which the payee's name had been changed,⁵¹ on the theory that the drawee bank is liable on its certification according to the tenor of the check at the time of certification.⁵² In the majority of jurisdictions, on the other hand, the drawee bank is held liable on its certification according to the tenor of the check at the time it was drawn. The reasoning behind the majority rule is that the drawee bank has contracted to pay the checks of the drawer according to his order only. Consequently, a payment to one other than the original payee does not constitute payment and, if the check has been raised, any amount paid in excess of the original amount can be recovered.⁵³ In view of this conflict of authority

covering from forgers, thieves, or from those who have no title to the instrument." See Annot., 71 A.L.R. 331, 337 (1931).

48. 1 PATON, DIGEST 808 *et seq.* (1940). For two Louisiana cases holding the drawee guilty of negligent certification and permitting a holder in due course to recover on the instrument as altered, see *Godchaux v. Union National Bank*, 28 La. Ann. 516 (1876), cited in Annot., 22 A.L.R. 1157, 1162 (1923); and *Helwege v. Hibernia National Bank*, 28 La. Ann. 520 (1876). See Comment, *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana—The Doctrine of Young v. Grote*, 16 LOUISIANA LAW REVIEW 134 (1955).

49. See discussion in Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450 *et seq.* (1935).

50. See note 16 *supra*.

51. *Wells Fargo Bank & Union Trust Co. v. Bank of Italy*, 214 Cal. 156, 4 P.2d 781 (1931); *National City Bank v. National Bank of the Republic*, 300 Ill. 103, 132 N.E. 832, 22 A.L.R. 1153, 1157 (1921).

52. These courts contend that this is the literal and intended interpretation of NIL § 62, which was designed to change the common law rule. See 1 PATON, DIGEST 806-07 (1940). This reasoning was approved in Comment, *Certifying Altered Checks Under the Negotiable Instruments Law*, 31 YALE L.J. 522 (1922); Notes, 4 ILL. L.Q. 202 (1921), 35 HARV. L. REV. 749 (1922). It was disapproved in Notes, 22 COLUM. L. REV. 260 (1922), 6 MINN. L. REV. 405 (1922), 31 YALE L.J. 548 (1922).

53. Louisiana is now in accord with this majority rule. See *Lawrence J. Kern, Inc. v. Panos*, 177 So. 432 (La. App. 1937), cited in Annot., 137 A.L.R. 874, 875 (1942). See also Annots., 121 A.L.R. 1056 (1939), 69 A.L.R. 1076 (1930), 26 A.L.R. 312 (1923), 22 A.L.R. 1157 (1923), 12 A.L.R. 1089 (1921). For a general discussion, see 1 PATON, DIGEST 806 *et seq.* (1940), where a very good argument is made for the majority position from the language of NIL §§ 124, 125, and 132. NIL § 132 provides that "the acceptance of a bill is the signification by the drawee of his assent to the order of the drawer." This has been interpreted to mean that the measure of the acceptor's obligation is the original, rather than

and the refusal of the Commissioners on Uniform State Laws to amend the NIL to conform to the majority rule,⁵⁴ most banks have undertaken to limit their liability on certification or else refuse to certify at all. In most instances the conditional certification takes the form "payable as originally drawn" or some similar phrase.⁵⁵ Conditional certification is also used where the drawee bank returns an instrument for proper endorsement.⁵⁶ This is because decisions in several cases hold that the certifying bank is liable on the instrument notwithstanding the lack of the payee's endorsement. Those decisions have been based on the theory that a new contract has been entered into by the certifying bank.⁵⁷

As a general rule, the drawee bank does not have to recognize a stop payment order of the drawer.⁵⁸ In some jurisdictions, however, a distinction is made between certification at the request of the drawer and certification at the request of the holder.

the altered, tenor of the instrument. NIL § 123 provides that a material alteration without the assent of the parties avoids the instrument. NIL § 125 defines material alteration, and this definition has been held to include a change in the payee's name. See Comment, *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana — Material Alterations*, 16 LOUISIANA LAW REVIEW 105 (1955).

54. 2 PATON, DIGEST OF LEGAL OPINIONS 1071, op. 108(a) (1926).

55. Most banks have accepted the conditional certification form recommended by the legal department of the American Bankers' Association, which is as follows:

CERTIFIED

Payable only as originally
drawn and when properly
indorsed

.....Date
.....Bank
.....Address
.....Authorized signature.

See illustrations in Dahlin, *What Every Lawyer Should Know About . . . Checks*, 43 ILL. B.J. 168, 174 (1954); 1 PATON, DIGEST 800 *et seq.* (1940).

56. See discussion in Dahlin, *What Every Lawyer Should Know About . . . Checks*, 43 ILL. B.J. 168, 174-75 (1954); Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 454 (1935).

57. *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N.Y. Supp. 83 (1st Dep't 1904). This would indicate that "the apparent holder upon obtaining certification could require payment regardless of title, as upon a new contract." Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 455 (1935), discussing *Freund v. Importers and Traders Nat. Bank*, 76 N.Y. 352 (1879) and *Lynch v. First Nat. Bank*, 107 N.Y. 179, 13 N.E. 775 (1887). It is pointed out, however, that no courts have ever gone that far. The drawee is liable on its certification, however. *Lipten v. Columbia Trust Co.*, 194 App. Div. 335, 185 N.Y. Supp. 198 (1st Dep't 1920). In the *Lipten* case the court found the bank not liable to the holder of a check who held without endorsement, but this was on the theory that the certification should be deemed conditional before its presentation properly endorsed. See Annot., 12 A.L.R. 992, 993 (1921).

58. *Freund v. The Importers and Traders National Bank*, 76 N.Y. 352 (1879) is the initial authority for this proposition. See discussion in 1 PATON, DIGEST 823 *et seq.* (1940).

In those jurisdictions, where certification has been procured by the drawer the bank must recognize the stop payment order. It does not have to do so where certification has been procured by the holder.⁵⁹ Where a stop payment order is recognized, the bank will usually be permitted to avail itself of certain of the drawer's defenses.⁶⁰ In addition, the bank will usually require a bond of indemnity from the party requesting that payment be stopped.⁶¹ As a result of this conflict in authority, however, many banks refuse to stop payment of certified checks.

Most banks refuse to certify postdated checks, either because it is prohibited or because it is considered a questionable banking practice.⁶² Where such certification is prohibited, stop payment orders, otherwise ineffective, have been permitted.⁶³ A distinction should be noted between certification of a postdated check at the request of the drawer and that at the request of the holder. Where done at the request of the holder, the bank has been denied the right to charge the drawer's account.⁶⁴ Where done at the request of the drawer, however, it has been considered a valid transaction.⁶⁵ But, in either instance, it has been held that a transfer of a certified check to a holder before its date is notice of a possible irregularity and deprives the holder of the status of a holder in due course.⁶⁶

59. See *Sutter v. Security Trust Co.*, 96 N.J. Eq. 644, 126 Atl. 435, 35 A.L.R. 938, 942 (1924); *Hamburger Bros. & Co. v. Third National Bank & Trust Co.*, 333 Pa. 377, 5 A.2d 87 (1939); *Roberts & Morris, The Effect of a Stop Payment Order on a Certified Check*, 5 Wyo. L.J. 170 (1951); STEFFEN, *CASES ON COMMERCIAL AND INVESTMENT PAPER* 495 (2d ed. 1954). See also Annots., 107 A.L.R. 1463 (1937), 94 A.L.R. 1391 (1935), 56 A.L.R. 532 (1928), 9 A.L.R. 1069 (1920).

60. See *Times Square Automobile Co. v. Rutherford National Bank*, 77 N.J.L. 649, 73 Atl. 479 (1909). See also discussion in Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 458 *et seq.* (1935). See also Green, *Real Defenses and the Negotiable Instruments Law*, 9 TUL. L. REV. 78 (1934).

61. 1 PATON, *DIGEST* 824-25 (1940); see Dahlin, *What Every Lawyer Should Know About . . . Checks*, 43 ILL. B.J. 168, 176 (1954). The Louisiana court has permitted stop payment of cashier's checks. See *Nielsen v. Planters' Trust & Savings Bank*, 183 La. 645, 164 So. 613 (1935), *reversing* 161 So. 346 (La. App. 1935). It would seem the same rule would apply to certified checks.

62. For a general discussion on the subject of postdated checks, see Breckenridge, *The Negotiability of Postdated Checks*, 38 YALE L.J. 1063 (1929). For certification of postdated checks in particular, see Annot., 21 A.L.R. 234, 236 (1922); 1 PATON, *DIGEST* 835-36 (1940); and discussion in Dahlin, *What Every Lawyer Should Know About . . . Checks*, 43 ILL. B.J. 168, 176 (1954).

63. See Annot., 35 A.L.R. 938, 942 (1925), citing *Sutter v. Security Trust Co.*, 96 N.J. Eq. 644, 126 Atl. 435 (1924).

64. Dahlin, *What Every Lawyer Should Know About . . . Checks*, 43 ILL. B.J. 168, 175-76 (1954).

65. *Ibid.*

66. *Ibid.*

As a general rule, a bank may revoke its certification of a check where such certification is made because of mistake. This right is denied, however, when the rights of third persons have intervened or their situation has been so changed between the time of the certification and the cancellation as to render it inequitable to permit revocation.⁶⁷ This same rule applies where certification has been procured by fraud.⁶⁸ The cases indicate that the courts are liberal in permitting banks to correct errors.⁶⁹ According to the general view, the payment of an overdraft by a bank constitutes a loan to the depositor.⁷⁰ The bank may recover the amount of the overdraft from the depositor, even though it has certified the check as good. The drawer of a check who retains the certified instrument or who regains possession of it may have the certification cancelled or the check re-deposited to his account. The bank in such case will usually seek to determine whether the drawer is fraudulently in possession of the instrument. In case of doubt, the bank may require a bond or other form of indemnity or a statement from the payee that he has no interest in the check.⁷¹ If the check has been lost, the bank will require indemnity in almost every instance.⁷²

Certification Under the Uniform Commercial Code

According to its draftsmen, the Uniform Commercial Code is designed to promote uniformity in every phase of commercial affairs.⁷³ To this end, it was felt necessary that the NIL be subjected to revision, to settle old disputes and to avoid conflict with rules established for other phases of commerce.⁷⁴ In the field of certification, numerous changes or additions have been suggested over the years.⁷⁵ The draftsmen of the Code, however,

67. 1 PATON, DIGEST 839-40 (1940); see Annot., 29 A.L.R. 140 (1924).

68. *Ibid.*

69. See discussion in Steffen & Starr, *A Blue Print for Certified Checks*, 13 N.C.L. REV. 450, 475, n. 136 (1935).

70. See Annot., 12 A.L.R. 358, 360 (1921). For effect of overcertification in general, see Annot., 2 A.L.R. 83, 90 (1919).

71. 1 PATON, DIGEST 840 *et seq.* (1940); see discussion in Dahlin, *What Every Lawyer Should Know About . . . Checks*, 43 ILL. B.J. 168, 176 (1954).

72. See note 71 *supra*.

73. See UCC introductory comment to title, at p. 2, where the draftsmen say: "The concept of the present Act is that 'commercial transactions' is a single subject of the law, notwithstanding its many facets. . . . This Act purports to deal with all phases which may ordinarily arise in the handling of a commercial transaction, from start to finish."

74. UCC 3-101, comment.

75. See, e.g., Ames, *The Negotiable Instruments Law*, 14 HARV. L. REV. 241 (1900); Ames, *The Negotiable Instruments Law—A Word More*, 14 HARV. L. REV. 442 (1901); Beutel, *The Necessity of a New Technique of Interpreting the NIL—The Civil Law Analogy*, 6 TUL. L. REV. 1 (1931); Beutel, *The Proposed Uniform Bank Collection Act and Possibility of Recodification of the Law on*

propose merely to reword and combine the two provisions of the NIL and to add two new subsections as statements of current practice.⁷⁶ Any changes in the law of certification are found in other sections of the Code. The proposed Code provision on certification is as follows:

Section 3-411: "(1) Certification of a check is acceptance. Where a holder procures certification the drawer and all prior indorsers are discharged.

"(2) Unless otherwise agreed, a bank has no obligation to certify a check.

"(3) A bank may certify a check before returning it for lack of proper indorsement. If it does so the drawer is discharged."

Subsection (1) of UCC 3-411 combines and rewords NIL sections 187 and 188. The first sentence of subsection (1) has changed the wording of NIL section 187 from the statement that "certification is equivalent to acceptance" to the more positive statement that "certification is acceptance." (Emphasis added.) It also eliminates the redundant portion of NIL section 187 which stated "by the bank on which it is drawn." Those words were unnecessary, for certification can only be made by the bank on which the check is drawn.⁷⁷

Several writers have concluded that the statement "certification is acceptance" would change the law by eliminating the difference in the drawer's liability where either the drawer or the holder procures certification.⁷⁸ Such is not the case under the present draft of the Code, however, for the second sentence of subsection (1) recognizes this distinction.⁷⁹ The more positive

Negotiable Instruments, 9 TUL. L. REV. 378 (1935); Hudson & Feller, *The International Unification of Laws Concerning Bills of Exchange*, 44 HARV. L. REV. 333 (1931); Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450 (1935); Turner, *Revision of the Negotiable Instruments Law*, 38 YALE L.J. 25 (1928); Turner, *A Factual Analysis of Certain Proposed Amendments to the Negotiable Instruments Law*, 38 YALE L.J. 1047 (1929).

76. UCC 3-411, comment.

77. Particularly so in view of federal and state statutes making it a criminal offense to certify a check against insufficient funds. See note 21 *supra*.

78. See *A Symposium of the Proposed Uniform Commercial Code*, 17 ALBANY L. REV. 1, 76-77 (1953); Palmer, *Negotiable Instruments Under the Uniform Commercial Code*, 48 MICH. L. REV. 255, 289-90 (1950).

79. See Andrews, *Should Article 3 of the Uniform Commercial Code be Adopted in Ohio?*, 14 OHIO ST. L.J. 32, 47-48 (1953); Ritz, *Virginia Law and the Commercial Paper Article of the Uniform Commercial Code*, 12 WASH. & LEE L. REV. 1, 51-52 (1955); Steinheimer, *Impact of the Commercial Code on Liability*

statement of the Code should serve more to clarify the law in this respect than to change it.⁸⁰ Considerable confusion is apparent in the present law on certification as a result of this distinction and the unfortunate wording of NIL sections 187 and 188. As indicated previously, several courts have treated certification of a check as a thing apart from acceptance. In the case of the discharge of the drawer, other courts have called it the equivalent of payment or the substitution of a new obligation. As a remedy for this confusion and for similar misunderstandings concerning the effect of an instrument on the obligation for which it is given, the Code proposes an entirely new section. UCC 3-802(1) (b) adopts the rule that a check or other negotiable instrument represents only a conditional payment. This means that the right to sue on the obligation is suspended until the instrument is due and will be revived only if the instrument

of Parties to Negotiable Instruments in Michigan, 53 MICH. L. REV. 171, 194 (1954).

80. However, there are two changes in the language of NIL § 188 that may cause difficulty. The first of these changes is with respect to the language of NIL § 188 to the effect that when the holder of a check procures it to be "accepted or certified" the drawer and all endorsers are discharged. The second sentence of subsection (1) of UCC 3-411 eliminates the word "accepted" and retains the word "certification." No reason for this change is given. In view of the fact that "certification is acceptance" under the Code, this change should be without significance, but it could be interpreted to mean that where "acceptance" is procured the drawer remains liable. The argument was presented under the NIL that although it was provided that certification is equivalent to acceptance, it was not provided that acceptance was equivalent to certification. See Beutel, *The Proposed Uniform Bank Collection Act and Possibility of Recodification of the Law of Negotiable Instruments*, 9 TUL. L. REV. 378, 389 (1935). It should be presumed, however, that the terms "acceptance" and "certification" are intended to be used interchangeably. But this same intention was present when the NIL was drafted, and confusion still resulted. See Dahlin, *What Every Lawyer Should Know About . . . Checks*, 43 ILL. B.J. 168, 174 (1954), where a federal ruling requiring government agencies to accept only certified checks with the word "certified" stamped on them and not those stamped "accepted" is referred to. The draftsmen of the Code should properly explain all changes to avoid confusion. For similar criticism see Beutel, *Comparison of the Proposed Commercial Code, Article 3, and the Negotiable Instruments Law*, 30 NEB. L. REV. 531, 533-34 (1951).

The second change in language which may cause difficulty is with respect to the language of NIL § 188 to the effect that where the holder procures certification, the drawer and "all indorsers" are discharged. Subsection (1) of UCC 3-411 would change this provision to read "all prior indorsers" are discharged. (Emphasis added.) Under the NIL provision the holder could have argued that he, too, was an endorser and should be discharged. See the fact situation presented in *Mutual National Bank v. Rotge*, 28 La. Ann. 933 (1876), where the holder who procured certification urged that the party accepting the check from him had accepted the bank's obligation in lieu of his own. Although the draftsmen of the Code fail to explain the change, the words "prior indorser" should make it clear that the holder himself is not discharged. However, the draftsmen have indicated that any endorsement made after certification remains effective. See UCC 3-411, comment 1. They also state that if one desires to continue liable on the instrument despite certification, the words "after certification" inscribed by the endorsement will suffice to maintain liability. But this does not pertain

is dishonored. Once dishonored, the right to sue is granted either on the instrument or the obligation supporting it.⁸¹

UCC 3-802(1) (a), however, provides that the obligation is not suspended but discharged where the obligation of a bank is present, either as drawer, maker or acceptor, and there is no recourse against the underlying obligor. A discharge on the instrument in this case is a discharge of the original obligation. Such is the case where the holder procures certification.⁸² The certified check in this instance is not a conditional obligation, but is regarded as the equivalent of payment of the original obligation.⁸³ This is in accord with jurisprudence under the NIL that in such a case certification is the equivalent of payment. Since the drawer is not discharged where he obtains the certification, the certified check would continue as a conditional obligation. This provision should settle any conflict as to the nature and effect of a certified check. UCC 3-411(1), when read in conjunction with UCC 3-802(1) (b) and (c), seems to represent a much better statement of the rule than NIL sections 187 and 188.⁸⁴

There seems to be considerable merit, however, in the contention advanced by some that the difference in result where certification is procured either by the drawer or by the holder should not be permitted to continue.⁸⁵ The reason for discharg-

to the party procuring the certification. Thus it would seem one could argue that if the holder endorses prior to certification he could obtain his own release. A word of explanation seems to be required in the Code in this regard.

81. UCC 3-802, comment 3.

82. *Id.* comment 2.

83. *Ibid.* Not treated here, but involving problems similar in effect and scope, is the question of the right to attach or garnish the funds while in the hands of the bank. See cases cited in BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 592 *et seq.*, 827 *et seq.*, 1034 *et seq.*, 1223 *et seq.* (7th ed., Beutel, 1948). See *National Commercial Bank v. Miller & Co.*, 77 Ala. 168 (1884), using the theory that "certification is equivalent to payment" to permit garnishment. *But see* *Causey v. Eiland*, 175 Ark. 929, 1 S.W.2d 1008, 56 A.L.R. 529 (1928); *Parker v. Walsh*, 200 Iowa 1086, 205 N.W. 853 (1925); *University Supply Co. v. Hildreth*, 287 Mass. 538, 192 N.E. 23 (1934); *Standard Factors Corp. v. Manufacturers Trust Co.*, 182 Misc. 701, 50 N.Y.S.2d 10 (1st Dep't 1944); *Citizens' National Bank v. First Nat. Bank*, 66 Colo. 426, 182 Pac. 12 (1919). See also *Annots.*, 94 A.L.R. 1389, 1391 (1935), 42 A.L.R. 622, 625 (1926), 5 A.L.R. 589 (1920). See NIL § 189 and compare with UCC 3-409.

84. UCC 3-802(1) (a), however, could be either better worded or explained. As presently written it does not adequately express the thought that two things must combine for there to be a complete discharge: (1) the obligation of the bank as maker, drawer or acceptor; and (2) the discharge of the underlying obligor on the instrument. The present wording, at first blush, would lead one to believe that any time the bank assumes an obligation on an instrument all other parties are discharged.

85. See discussion in Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 476 *et seq.* (1935).

ing the drawer where the holder procures certification grew out of the many bank failures of the 1870's.⁸⁶ The courts at that time felt that it was only just to discharge the drawer rather than have him bear the risk of bank failure when the holder elected to procure certification rather than payment. It can be argued that the drawer is not exposed to that danger today⁸⁷ and that he should remain secondarily liable on the instrument in all cases. It can be argued just as effectively, however, that the drawer should be discharged regardless of who procured the certification, since the bank has charged the drawer's account and assumed responsibility on the instrument.⁸⁸ The draftsmen of the Code, apparently, are not in favor of either change and merely prefer to revise the wording of the law to state it more clearly. It is submitted that either of the suggested changes are worthy of adoption. Adoption of the recommendation that the drawer be held liable in all cases would be in complete accord with the idea that certification is acceptance. Without the qualification respecting discharge of the drawer when certification is procured by the holder, all possible confusion would be eliminated as to the nature and effect of certification, for there would be no doubt that it is to be treated as an acceptance in every instance. Adoption of the recommendation that the drawer be discharged in every instance would also have its advantages. Although it would involve a complete change in the law of certification by making it the equivalent of payment, it would inject simplicity into the law and would give the public complete faith in such instruments.⁸⁹

Since certification is acceptance, any changes proposed in the Code with respect to acceptance would also affect the law on certification. One change to be noted which would affect two practices under the NIL is the provision of UCC 3-410(1) which requires the acceptance to be written on the draft.⁹⁰ Under the

86. *Id.* at 467 *et seq.*

87. With current banking practices and laws being what they are and the protection of the F.D.I.C. being extended to certified checks up to \$10,000.

88. See *Mutual National Bank v. Rotge*, 28 La. Ann. 933 (1876), where this same point was urged in a similar vein but rejected by the Louisiana court. Acceptance of a certified check in this instance would constitute a novation. See LA. CIVIL CODE art. 2185 *et seq.* (1870). This would in effect uphold the reasoning of those courts that maintain that the bank has entered into a new contract. Certification would then be the equivalent of payment, not acceptance.

89. This last approach has been strongly recommended. See Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. Rev. 450, 477 (1935).

90. UCC 3-410(1): "Acceptance is the drawee's signed engagement to honor

NIL, acceptances may be written on the draft or on separate paper.⁹¹ Promises to accept are also treated as acceptances where there has been reliance on such promises.⁹² Under the requirement that the acceptance be written on the draft, neither of these practices could be treated as an acceptance.⁹³ Certification on a separate instrument would no longer be treated as an acceptance and any rights arising through such practice would be relegated to an action in tort or contract.⁹⁴ Promises to accept would not be treated as acceptances but would be governed by provisions relating to letters of credit.⁹⁵ Some writers have disagreed with these provisions since they would abolish what they consider to be common practices.⁹⁶ The draftsmen of the Code, on the other hand, contend that the need for "collateral" acceptance is no longer present and that good commercial and banking practice no longer sanctions acceptance by separate writing.⁹⁷ Since those rights which are presently recognized are preserved in the Code,⁹⁸ no serious objection should be made to the change. It serves the purpose of clarifying the concept of acceptance and eliminating from that definition those practices which do not exactly conform to its terms.

The draftsmen of the Code propose to put an end to the dispute concerning the liability of the drawee bank on a check on which the name of the payee has been changed or the amount of the check has been raised prior to certification. NIL section 62 provides that the acceptor is liable "according to the tenor of his acceptance." The majority of the courts have interpreted this provision to mean the tenor of the instrument at the time it was

the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery or notification."

91. NIL §§ 132-135.

92. NIL § 135.

93. UCC 3-410, comment 3. The Code provision is the same as section 17 of the English Bills of Exchange Act, 1 & 2 GEO. IV, c. 78 (1821).

94. UCC 3-409(2); see UCC 3-410, comment 3.

95. UCC 5-101 *et seq.*

96. See Beutel, *Comparison of the Proposed Commercial Code, Article 3, and the Negotiable Instruments Law*, 30 NEB. L. REV. 531, 551 (1951); *A Symposium of the Proposed Uniform Commercial Code*, 17 ALBANY L. REV. 1, 76-77 (1953). But see Palmer, *Negotiable Instruments Under the Uniform Commercial Code*, 48 MICH. L. REV. 255, 289-90 (1950), where the idea is expressed that the changed provision would provide greater simplicity "without the loss of any needed legal device."

97. See UCC 3-410, comment 3. For a reply to criticism see 1954 NEW YORK STATE LEGISLATIVE ANNUAL 85, the report of the New York Law Revision Commission on its study of the Code articles 3 and 4. See also the reply of the Subcommittee for article 3 of the Editorial Board of the Uniform Code in Supplement No. 1 to the UCC, at 117 (1955).

98. UCC 3-409(2); see UCC 3-410, comment 3.

drawn. The Illinois and California courts, however, have applied NIL section 62 literally and have held that it means the tenor of the instrument at the time of acceptance or certification.⁹⁹ When asked to amend the language of NIL section 62 to conform to the interpretation given by the majority, the Commissioners on Uniform State Laws refused to do so and indicated that the interpretation given by the Illinois and California courts was correct.¹⁰⁰ As a result, conditional certification has become an almost uniform practice. The Code, however, adopts the minority view and eliminates the practice of conditional certification.¹⁰¹ UCC 3-413(1) provides that "the maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement." This language makes it clear that the liability of the drawee bank is determined according to the form of the instrument at the time of the acceptance or certification, and not at the time the instrument was drawn. UCC 3-417(1) (c) and UCC 4-207 supplement UCC 3-413(1). Those sections, in listing the warranties of a holder in due course and collecting bank to a payer which has certified, omit any warranty against material alteration prior to certification, even when the check has been certified on the condition that it is "payable as originally drawn" or in similar terms. Thus, one accepting an altered check that has been accepted or certified would be protected, despite conditional certification. The accepting or certifying bank would be liable on the instrument as of the time of its acceptance or certification and would not be permitted to contract away this liability. The effect of these provisions would be to give the public complete faith in accepted or certified checks and would provide absolute protection to the holder in due course of such instruments. In view of the fact that the vast majority of the courts of this country have taken the opposite position, however, acceptance of these provisions seems doubtful.¹⁰²

Concerning the remedy of the bank in the above situation, the Code would provide some protection. The above cited provisions are designed only to protect the holder in due course of

99. See note 51 *supra*.

100. See note 54 *supra*.

101. See Brome, *Bank Deposits and Collections*, 16 LAW & CONTEMP. PROB. 308, 318-19 (1951); Sutherland, *Article 3—Logic, Experience and Negotiable Paper*, 1952 WIS. L. REV. 230, 247.

102. In Louisiana, this would represent a return to the old "reliance on the certification" theory expounded in early cases, notably *Louisiana National Bank v. Citizens Bank*, 28 La. Ann. 189, 26 Am. Rep. 92 (1876).

an instrument that has already been accepted or certified.¹⁰³ The bank's action against the person presenting the check for acceptance or certification would be retained. In addition, UCC 3-417 and UCC 4-207 provide that unless otherwise agreed, one obtaining payment or acceptance or any prior transferor warrants to the party who pays or accepts in good faith several things: that he has good title to the instrument or is authorized to obtain payment or acceptance, that he has no knowledge that the signature of the maker is unauthorized, and that the instrument has not been materially altered.¹⁰⁴ These provisions fully establish the liability of the presenting party.

The effect of these provisions, however, would be doubtful in at least one respect. Subsection (3) of UCC 3-411 is intended to provide statutory recognition of the practice of drawee banks certifying checks received by them for collection before returning them for proper endorsement.¹⁰⁵ That subsection also recognizes that where such checks are certified the drawer is discharged. The purpose of such certification is to protect the drawer against a longer contingent liability.¹⁰⁶ In some decisions reached under the NIL, the certifying bank was deemed to remain liable on the certification whether proper endorsement was subsequently obtained or not.¹⁰⁷ The right of the certifying bank to charge the drawer's account was then put in doubt. As a result, most banks resorted to conditional certification to make their liability for certification dependent upon proper endorse-

103. See UCC 3-418 to the effect that "payment or acceptance of any instrument is final in favor of a holder in due course." This section is intended to continue the doctrine of *Price v. Neal*. See *id.* comment, and UCC 3-417, comment 5.

104. Such warranties have long been proposed. See Steffen & Starr, *A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 479 *et seq.* (1935). It was originally proposed that the one obtaining payment or acceptance or any prior transferor also warrant that he has no knowledge of any effective stop payment directive. See UCC 3-417(1) (b) in UNIFORM COMMERCIAL CODE, OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (1952). However, because of extensive criticism and the possibility of more trouble than benefit, this warranty has been removed. According to the draftsmen, the protection afforded payers by the warranty was not necessary because of the provisions of UCC 4-407 which grant the payer bank a right of subrogation on improper payment. But the deletion of the warranty is not intended to affect the common law decisions on the question. See SUPPLEMENT NO. 1 TO THE 1952 OFFICIAL DRAFT OF TEXT AND COMMENTS ON THE UNIFORM COMMERCIAL CODE, PART I, at 21 and 29, UCC 3-417 and 4-207 and reasons therefor (Jan. 1955). See, generally, Vergari, *In re Articles 3, 4, and 5*, 28 TEMPLE L.Q. 529, 537 (1955).

105. UCC 3-410(2) authorizes this practice when it states: "A draft may be accepted although it has not been signed by the drawer or is otherwise incomplete or is overdue or has been dishonored."

106. UCC 3-411, comment 3.

107. See note 57 *supra*.

ment.¹⁰⁸ In such case, if the drawer could validly question the right of the bank to charge his account, the certifying bank could deny liability on the instrument and recredit the drawer's account.¹⁰⁹ Under the Code, however, the drawer would be discharged and the bank would be liable on the instrument.¹¹⁰ It is not explained whether the authority to certify incomplete instruments and to discharge the drawer upon such certification was intended to prevent recourse by the drawer if the proper endorsement could not be subsequently obtained. Apparently, conditional certification would be to no avail.¹¹¹ It would also be doubtful if the warranties of UCC 3-417(1) and UCC 4-207 would extend to this situation, for under the new contract theory advanced in the cited decisions, the apparent holder of the instrument could obtain payment regardless of title.¹¹² Some clarification is needed in the Code on this point.

Subsection (2) of UCC 3-411 merely incorporates the long-recognized rule that in the absence of agreement a bank is under no obligation to certify a check.¹¹³ The reason given by the draftsmen of the Code for this rule is that a check is a demand instrument calling for payment rather than acceptance.¹¹⁴ The Code recognizes that a bank may enter into agreements whereby it undertakes to certify checks of the drawer. Liability for breach of the agreement would not be on the instrument, however, but on the separate agreement.¹¹⁵ It will be remembered that a refusal to certify a check does not dishonor the instrument;¹¹⁶ however, the reasoning for this rule has been questioned.¹¹⁷ Under the rule proposed in the Code there must be a re-presentment of the instrument for payment before it will be

108. See American Bankers' Association form, note 55 *supra*.

109. See UCC 4-401 for the right to charge the customer's account. That section provides in subsection (2) that "a bank which in good faith makes payment to a holder may charge the indicated account of its customer according to (a) the original tenor of his altered item; or (b) the tenor of his completed item, even though the bank knew it was incomplete when delivered."

110. See UCC 3-302(1) (a).

111. UCC 3-413(1), 3-417(1)(c), 4-207. Of course, it is highly unlikely that one taking an instrument containing an irregularity could be classified as a holder in due course.

112. See note 57 *supra*.

113. See note 29 *supra*.

114. UCC 3-411, comment 2.

115. *Ibid.*; UCC 3-409(1).

116. *Wachtel v. Rosen*, 249 N.Y. 386, 164 N.E. 326, 62 A.L.R. 674, 677 (1928), is the leading case for this proposition.

117. *Steffen & Starr, A Blue Print for the Certified Check*, 13 N.C.L. REV. 450, 461-62 (1935); *Turner, A Factual Analysis of Certain Proposed Amendments to the Negotiable Instruments Law*, 38 YALE L.J. 1047, 1060 *et seq.* (1929).

considered dishonored. It is submitted that this is an unduly technical procedure that is unwarranted in certain circumstances. Subsection (2) should be expanded to provide that a refusal to certify will constitute dishonor of the instrument unless it is against the general policy of the bank to certify checks or to certify checks below a certain amount.¹¹⁸

The law of certification would be changed in yet another respect by the adoption of the Code. Under the NIL, as a general rule, the drawer remains liable where certification has been obtained at his own request except to the extent that he has suffered loss through unreasonable delay.¹¹⁹ It appears that this rule has been applied only in cases involving the failure of the drawee or payer. It is the opinion of the draftsmen of the Code that this provision has not worked out satisfactorily because of the difficulty encountered by the drawer in proving his loss.¹²⁰ UCC 3-502(1) (b) changes this rule by substituting a right to assign to the holder the rights the drawer had against the drawee or payer on the instrument. The assignment would give the holder a claim against the drawee or payer. In view of the fact that the drawer has seldom been able to prove his discharge, the change may be desirable.

UCC 3-503 is the only provision of the Code concerning time of presentment. Subsection (1) (b) recognizes the rule of NIL section 186 that a check must be presented within a reasonable time. Subsection (1) (e) provides that presentment must be within a reasonable time after a secondary party becomes liable on the instrument. UCC 3-503(2) states that a reasonable time is to be determined "by the nature of the instrument, any usage of banking or trade and the facts of the particular case." Since special provision is made concerning what is a reasonable time in regard to uncertified checks, certified checks must be subject to the broad rule of UCC 3-503(2).¹²¹ Under the Code, the running of the statute of limitations would be suspended until the instrument is due.¹²² In effect, this is the same as the majority rule under the NIL.¹²³ Although the NIL provides that a check must

118. These are the two reasons advanced for refusing to certify. See Turner, *A Factual Analysis of Certain Proposed Amendments to the Negotiable Instruments Law*, 38 YALE L.J. 1047, 1060 *et seq.* (1929).

119. NIL § 186.

120. UCC 3-502, comment 2.

121. UCC 3-503(2).

122. UCC 3-802, comment 3.

123. See note 44 *supra*.

be presented within a reasonable time or the drawer will be discharged to the extent of his loss through delay, many courts have held that a certified check was not due until presented for payment.¹²⁴ Under this rule, a certified check would be valid indefinitely. Whether the Code would change this approach is difficult to determine since it adopts practically the same provision as the NIL.

Another area of the law of certification that would be affected by the Code is that of the right to stop payment. UCC 4-403(1) specifically recognizes the right to stop payment, subject, however, to the provisions of UCC 4-303. This latter provision provides in subsection (1) that "any notice, stop-order or legal process received and any valid setoff exercised by a payor bank is entitled to priority over any item drawn on or payable by and received by the bank until but not after the bank has done any of the following: (a) accepted or certified the item" This section recognizes the liability of the bank on the certified instrument and maintains the majority rule of the NIL that the bank can refuse to recognize a stop payment order on a certified check regardless of who procured the certification.¹²⁵ However, the rule appears to recognize the right of the drawee to stop payment if it so desires. Since there are no Code provisions to cover this event, it would seem that the rules developed under the NIL would still apply. But if the certified check is to be given the desired faith and trust of the public, stop payment orders should not be permitted at all.

The Code would make no changes in the law of certification on the subject of certification of postdated checks. UCC 3-114 simply states that the negotiability of an instrument is not impaired by the fact that it is postdated. This section does not appear to alter the rule that negotiation of a postdated check may constitute notice of a possible irregularity and deprive the holder of the status of a holder in due course.¹²⁶ Although the draftsmen of the Code state that UCC 3-114 is designed to remove uncertainties arising under the NIL provisions,¹²⁷ no provision is made to alleviate the confusion existing with respect to certification

124. See note 45 *supra*.

125. UCC 4-303, comments 1, 2; see note 58 *supra*.

126. UCC 3-114, comment 1: "Any fraud or illegality connected with the date of an instrument does not affect its negotiability, but is merely a defense under sections 3-306 and 3-307 to the same extent as any other fraud or illegality."

127. UCC 3-114, comment.

of postdated checks. Thus, if the Code were adopted most banks would probably continue their present policy of refusing to certify postdated checks, since no specific rule is presented in this regard. Some provision should be made in the Code to cover this subject, either by prohibiting certification of postdated checks altogether or by establishing rules to guide those banks which do certify postdated checks.

Conclusion

The difficulty encountered under the NIL of interpreting provisions to apply to questions on certification is not remedied in the Code. While there were two provisions in the NIL relating to this subject, the Code has reduced them to one provision with two additions stating accepted principles. The result of the arrangement under the NIL has been confusion and many conflicting decisions. It is not improbable that the same result would obtain under the Code. Although it would be asking too much to request that the rules on certification be codified separately, many special problems encountered in certification are ignored under the proposed treatment. Most of these problems arise because of the difference in treatment of situations where certification is procured by the drawer and where it is procured by the holder. Elimination of this distinction would place certification on a sounder basis and would permit easier application of other provisions of the law. It would eliminate the necessity of formulating two separate sets of rules to be applied in particular circumstances and would let it be known that certification is to be treated in all cases either the same as an acceptance or as a final payment. Although the Code would clarify many areas that are in doubt under the NIL, it has ignored this opportunity for improvement.

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